UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GALE PLUMBING AND HYDRONICS, INC.

and Case GR–7–CA–47512

WEST MICHIGAN PLUMBERS, FITTERS AND SERVICE TRADES, LOCAL UNION 174, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

*Donna Nixon, Esq.,* for the General Counsel.
*Grant T. Pecor, Esq.,* of Grand Rapids, MI, for the Respondent.
*Buckley C. Geno*, Business Agent, for the Charging Party.

## Decision

## Statement of the Case

*David L. Evans, Administrative Law Judge.* This case under the National Labor Relations Act (the Act) was tried before me in Grand Rapids, Michigan, on September 2, 2004.[1] On May 21, West Michigan Plumbers, Fitters and Service Trades, Local Union 174, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union), filed the charge in case GR–7–CA–47512 alleging that Gale Plumbing and Hydronics, Inc. (the Respondent), had committed various unfair labor practices under the Act. After administrative investigation of the charge, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging, inter alia, that the Respondent had discharged employee Steve DeWeerd in violation of Section 8(a)(3) and (1) of the Act. The Respondent duly filed an answer to the complaint admitting that this matter is properly before the Board but denying the commission of any unfair labor practices.

[1] Unless otherwise indicated, all dates mentioned are in 2004.

Upon the testimony and exhibits entered at trial, and after consideration of the briefs that have been filed, I enter the following findings of fact and conclusions of law.

## I. Jurisdiction and Labor Organization's Status

As it admits, at all material times the Respondent, a corporation with an office and place of business in Wyoming, Michigan, has been a construction contractor engaged as a provider of plumbing services. During 2003, in conducting that business operation, the Respondent purchased and received in Michigan materials and supplies valued in excess of $50,000 directly from suppliers that are also located within Michigan, but which materials and supplies were received by those suppliers directly from other suppliers that are located outside Michigan. Therefore, at all material times the Respondent has been an employer that is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent stipulated at trial, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Facts

Union business agent Buckley A. Geno testified that in October 2003 he and the Respondent's employees Matt Hieden and Charles Harkanson discussed the possibility of organizing the Respondent's field employees. In February, employees Jamie and Eric Montague also expressed an interest in organizing for the Union. By letter dated April 19, Geno notified the Respondent that its employees were organizing and "The following employee is a member of our Volunteer Organizing Committee: Charles Harkanson." The Respondent acknowledges receipt of this letter.

Geno further testified that he first met with alleged discriminatee DeWeerd on May 4 at which time DeWeerd signed a Union authorization card. Geno acknowledged that he did not encourage DeWeerd to speak to other employees about the Union (because, as Geno testified, DeWeerd was too "low keyed"). The Respondent discharged DeWeerd at about 7:00 a.m. on Thursday, May 20.

Geno identified a copy of a letter dated May 20 that he sent by certified mail and by fax to the Respondent. The letter is identical to his April 19 letter, except that the members of the volunteer organizing committee were named as "Steven DeWeerd, Jeremy Montague, and Eric Montague." (The letter did not mention Harkanson.) Geno testified that he faxed the May 20 letter to the Respondent that afternoon, at "5:00 o'clock or so," or about 10 hours after DeWeerd had been discharged. (Geno testified he did not learn that DeWeerd had been discharged until after he had sent his May 20 fax.) Geno testified that the fax was successfully sent, but the certified letter was ultimately returned as not accepted by the Respondent. Geno testified that he placed DeWeerd's name on his May 20 letter because, on May 18, Jeremy ("Jamie") Montague had told him that DeWeerd had been speaking in favor of the Union.

DeWeerd, a master plumber, testified that he first worked for the Respondent from 1996 to 1998. Deweerd had left on good terms, and he was re-hired in October 2003 without being required to complete a written application. DeWeerd further testified that, after he had signed a Union authorization card on May 4, he spoke positively about the desirability of Union representation to 6 of the Respondent's approximately 25 employees. DeWeerd testified that one such employee was Stan Truskoski. DeWeerd testified that he told Truskoski that he (DeWeerd) had made more money during his interim employment with a union-shop employer and that he was prounion. DeWeerd did not testify what, if anything, Truskoski replied on those occasions. DeWeerd testified that, from May 4 through May 19, he also sometimes spoke to other employees about the Union in the driveway of the Respondent's facility where the employees usually gathered after receiving their daily assignments. The assignments were to scattered sites in the area; sometimes the employees would go to more than one site in a day.

DeWeerd testified that on Wednesday, May 19, he was in a crew that was assigned to complete a job in Lansing. The crew had to stop early because the general contractor ordered them away so that some of his employees could work in the area were the Respondent's employees had been working. DeWeerd testified:

> And so we were kind of blown out of the water for the day and we were standing around and we were talking about, you know, getting enough signatures for the Union to go through. And then Stan left because he -- went outside because he got a phone call.
>
> And it was a call from [employee] Doug Arnold about having an antiunion meeting. ...
>
> And then we had a little round-robin discussion when he [Truskoski] came back in with the two helpers, Cole and Justin, and, you know, we talked for quite a while about it, you know, pros and cons and, you know, money wise and truck issues.
>
> And then [the crew] packed up a little early and went home because our plans for the day were disrupted by the general contractor.

DeWeerd testified that during the May 19 exchanges among the employees, Truskoski "sounded like he wanted to be part of the Union and make the money." The General Counsel did not ask DeWeerd to testify how many employees had been involved in the "round-robin" discussion, whether there were other prounion employees present, or what he may have said during that discussion.

DeWeerd further testified that at 7:00 a.m. on May 20, starting time, just after he received his day's assignment, Mike Gale, the Respondent's owner, approached him and stated, "Your services will no longer be needed by Gale Plumbing" and told DeWeerd to leave. DeWeerd left without asking for the reason for his discharge. DeWeerd testified, without contradiction, that he had received no negative criticism from the Respondent's supervisors before he was discharged and, on one occasion in December 2003, Gale told him that he liked to use him to "put out fires," meaning that DeWeerd was good at helping when the Respondent's crews got behind in their work.

On cross-examination DeWeerd acknowledged that he had once refused to follow a direct order by Gale to go into a septic tank which, DeWeerd claimed, contained human waste. DeWeerd further acknowledged that he had once turned in his time-and-materials reports on a piece of Styrofoam. On redirect examination, DeWeerd testified that it was not "real common" for one of the Respondent's plumbers to be required to go into a septic tank. DeWeerd further testified that sometimes Styrofoam was all that he had available to write on.

The General Counsel called Eric Montague who testified that DeWeerd was "outspoken" about his being prounion, but Montague flatly denied that any supervisors were ever present when DeWeerd spoke in favor of the Union. The General Counsel called Harkanson who testified that DeWeerd spoke favorably about the Union to "anybody and everybody," but he did not testify that DeWeerd made any prounion statements in the presence of any of the Respondent's supervisors.

Harkanson further testified that the usual payday is Friday, but that sometimes the checks are ready late on Thursday afternoons and that they are then distributed to employees. Harkanson testified that "about 5:30 in the evening" on Thursday, May 20, he went to his employee mailbox and, along with his check, he found a document headed "Memorandum." The document gives its date as "May 20, 2004," Gale is stated as its author, and its subject line is "Union Authorization Cards." The text of the memorandum is 3 paragraphs long. Generally, it states that the Respondent is aware that the Union is attempting to organize the employees by soliciting Union authorization cards and that, for various reasons, the employees should "be very careful about what you sign."

For the Respondent, Gale testified that he decided to discharge DeWeerd after 5:00 p.m. on May 19, and he further testified that, at the time, he had no knowledge of any prounion sympathy that DeWeerd may have held. Gale agreed with DeWeerd's testimony that he discharged DeWeerd shortly after 7:00 a.m. on May 20 without giving the employee any reason. Gale further identified the original of the May 20 fax that Geno sent to the Respondent on that date. As well as bearing the receipt date of "May–20–04," the fax bears the time stamp of "17:36," or 5:36 p.m.. (again, about 10 hours after DeWeerd had been discharged). Gale testified that he had left the Respondent's facility on May 20 before the fax was received and that he did not see it until the morning of Friday, May 21. Gale further testified that his May 21 receipt of the fax was his first notice that any employee other than Harkanson was in sympathy with the Union.

When asked on direct examination why he had discharged DeWeerd, Gale testified that, during DeWeerd's second tenure of employment with the Respondent, he chronically failed to turn in his paperwork on time, that on some occasions DeWeerd had been "rough with Company property and Company tools," and that DeWeerd once gave a profane, disrespectful answer when Gale asked him how things were going at a job. Gale testified that he never disciplined, or even counseled DeWeerd, about his derelictions because:

> I try to give my employees the benefit of the doubt, if they are having bad days or, you know, things aren't, you know, working right -- working out right in one way or another, and I try to be as tolerant as I can with people or situations where it might be mistakes, whatever. But you get to a point where you just can't tolerate it.

Gale testified that he "finally" decided to discharge DeWeerd when, after 5:00 p.m. on May 19, he overheard employee Truskowski speaking to the Respondent's general manager Bob Deboer, and that Truskoski:

... had said for the most part that didn't care who he worked with but he would rather that he didn't work with Steve anymore. He had been working with him for a couple of days and all he had heard was complaining, and wasn't happy, and Stan was trying to get a project done and, you know, it was -- it was -- he had just had enough and he just, you know -- and I heard it is like, well, [I decided that] I have had enough.

Gale denied that he heard Truskoski, in his May 19 statement to Deboer, mention the Union.

On cross-examination, Gale insisted that his memorandum to employees dated May 20 was sent out only because of the Union's May 20 fax, which he received on the morning of May 21. Gale testified that he caused the memorandum to be sent out after he received the Union's fax, whereas he had done nothing after receipt of the Union's April 19 letter (which, again, named only Harkanson as an employee-organizer), because "there were additional people listed on the organizing committee" in the fax. Gale testified that the dating of the memorandum was a "typo" by Dan Flickema, the Respondent's bookkeeper, office manager and admitted supervisor within Section 2(11). Gale further testified that he did not proofread the memorandum before it was distributed to the employees. Gale further testified that he did not know if the memorandum was distributed at the same time as the employees' paychecks that week or whether the paychecks that week were distributed on Thursday, May 20 or Friday, May 21.

Further on cross-examination, Gale denied that any employee had ever spoken to him about the organizational attempt; moreover, Gale flatly stated: "Nobody has come up to me and held a conversation related to the organizing drive. ... Nobody has directly come up to me and said, 'I am for the Union,' or, 'I am against the Union.'" When asked specifically if employee Doug Arnold had declared to him that he (Arnold) was opposed to the Union, Gale replied: "Not directly to me, no."

When asked on cross-examination about the reasons that he had given for DeWeerd's discharge, Gale gave the following replies: (1) There was a "possibility" that DeWeerd could have damaged the Respondent's tools by the way that he had handled them. When asked specifically if DeWeerd had damaged any tools, Gale replied, "I can't come up with a particular incidence that I can give you a dollar value of damage on some tools, no." After further questions by the General Counsel and insistence on a responsive answer, Gale acknowledged that he had seen DeWeerd mishandle tools only once and that the tools were not, in fact, damaged. (2) A mechanical grader was damaged by the actions of Arnold or Arnold's apprentice, but the Respondent undertook no investigation to determine which employee had been at fault. (3) Arnold ran a stop sign and damaged a Company truck, but he was not disciplined. (3) Other employees had failed to turn in time-and-materials lists, but they were not disciplined. (4) Gale acknowledged that it was "not impossible" that other employees had turned in their time-and-materials information on substances other than the Respondent's preprinted forms.

The Respondent called Flickema to establish just when the May 20 memorandum to employees was distributed. Flickema testified that counsel composed the memo; when asked when counsel did so, Flickema responded "On the Thursday before it went out in the paychecks." Counsel then showed to Flickema the fax of the Union's May 20 letter and referred to the time-stamp of 5:36 p.m. on May 20. Flickema then testified that the fax was not noticed until the morning of May 21, that it was then that he contacted counsel, that it was then that the memorandum was composed, and that the "May 20" dating of the memorandum was "incorrect."

In rebuttal, the General Counsel called employee Doug Arnold who testified that he once spoke to Gale about the Union and, "I told him I was not for it and if the Union was brought in that I would leave." Arnold testified that Gale replied that he could not talk about the matter.

B. Analysis and Conclusions

The General Counsel contends that the reasons that the Respondent advances for the discharge of DeWeerd constitute a mere pretext, that the Respondent actually discharged DeWeerd because he favored the Union, and that the discharge therefore violated Section 8(a)(3). The Respondent contends that the General Counsel has not stated a *prima facie* case of discrimination under the Act but that, assuming that the General Counsel has done so, it has demonstrated that it discharged DeWeerd solely for the reasons given in Gale's testimony.

In order to establish a *prima facie* case of discrimination that is proscribed by the Act, the General Counsel must first persuade the Board that the employer knew or suspected that an alleged discriminatee had engaged in union activities or possessed prounion sympathies and that those sympathies or activities were a substantial or motivating factor in the challenged employer decision. If the General Counsel does adduce such evidence of knowledge and motivation, the burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

DeWeerd did not secure authorization cards for the Union. The only union activities in which DeWeerd claims to have engaged is speaking in favor of the Union to other employees. The General Counsel concedes that there is no direct evidence that the Respondent knew that DeWeerd spoke to other employees about the Union, but the General Counsel argues on brief that the Board should nevertheless infer such knowledge on the basis of the small employee complement; the General Counsel also contends that relevant knowledge should be inferred because of the timing of DeWeerd's discharge as it relates to his last conversation about the Union and because of the weakness of the reasons for the discharge that the Respondent advances.

In support of the argument that knowledge of DeWeerd's conversations should be charged to the Respondent simply because of the small size of the employee complement (25 employees), the General Counsel on brief cites only *Emory Convalescent Home*, 260 NLRB 540, 260 NLRB 540 (1981). In that case the administrative law judge found that alleged discriminatee Lark had secured on union authorization cards the signatures of "15 to 17" of the employer's 20 employees. As the Board concisely stated in its second footnote to that decision:

> In accepting the Administrative Law Judge's finding that Lark's discharge was discriminatory, we rely on the fact that Lark openly engaged in union activities on the premises and distributed union cards to people on break and as they entered the building. In conjunction with the "small plant" doctrine, we infer Respondent had knowledge of Lark's union activities.

That is, in the only case cited by the General Counsel for invocation of the small-plant theory for imputing relevant knowledge to a charged employer,[2] the alleged discriminatee had engaged in more activities on behalf of a union that mere conversations with fellow employees. Moreover, in *Emory Convalescent Home*, all of the employees worked at one confined location, readily observable to supervisors whom the Board charged with relevant knowledge. In this case, the employees worked at scattered locations, sometimes they worked at more than one location per day, and some employees did not even report daily to the Respondent's facility. Therefore, even if DeWeerd had engaged in the more easily perceived activity of card-distributions, the likelihood of supervisory observation was substantially less than that in the case cited by the General Counsel.

In arguing that timing proves the relevant knowledge of DeWeerd's prounion sympathy, the General Counsel cites only DeWeerd's above-quoted testimony about his May 19 "round-robin" conversation with other employees at a location that was remote from the Respondent's facility. The General Counsel states: "DeWeerd's last conversation about the Union was with employee Stan Truskoski, an antiunion proponent. ... It can be inferred that Truskoski complained [to the Respondent] about DeWeerd's conversation about the Union since Truskoski was against the Union

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[2] See, generally, *Wiese Plow Welding Co., Inc.*, 123 NLRB 16 (1959).

and did not appreciate DeWeerd's prounion comments." This argument, however, subsumes facts that are not contained in the record: (1) DeWeerd testified that he had previously spoken to other employees, including Truskoski, in favor of the Union, but DeWeerd did not testify that he said anything in favor of the Union at the May 19 conversation among the employees. DeWeerd stated that the "pro," as well as "con," sides of the union question were discussed at the meeting, but he did not testify that he was the employee who argued the "pro" side at that time. The General Counsel's argument requires an inference that, because DeWeerd had previously spoken in favor of the Union, he also spoke in favor of the Union on May 19. I decline to draw that inference because if, during the May 19 "round-robin" employee conversation, DeWeerd had spoken in favor of the Union, the General Counsel presumably would have asked him to so testify. (2) There is no evidence that Truskoski was, as the General Counsel asserts, "an antiunion proponent" or "was against the Union." Indeed, DeWeerd testified that, at the time of the May 19 conversation, he thought that Truskoski "sounded like he wanted to be part of the Union and make the money." During the course of that conversation, Truskoski did momentarily withdraw to take the call of the antiunion employee Arnold, but DeWeerd did not testify that Truskoski expressed, before or after that point, any antiunion sympathies that he (Truskoski) may have held. Moreover, assuming that Truskoski was an antiunion employee, there is no presumption of law that antiunion employees always inform on prounion employees, even to employers that are antiunion.[3]

And I further reject the General Counsel's contention that there is independent evidence that the Respondent was an antiunion employer. The General Counsel refers to the Respondent's May 20 memorandum which said that employees should be careful about signing Union authorization cards. Having done so, the General Counsel states: "This is clear evidence of antiunion animus." The General Counsel, however, cites no cases and advances no argument to support that conclusion, and this finder-of-fact does not perceive the statement to reflect, of itself, a willingness to violate the law in order to defeat an organizational attempt.

Even given my rejection of these theories of the General Counsel, I nevertheless agree with the General Counsel's alternative argument that the totality of the circumstances demonstrates that the Respondent knew of DeWeerd's prounion sympathies and that the Respondent was motivated by those sympathies to discharge DeWeerd.

I believe that the Respondent issued the May 20 memorandum on exactly that date, May 20. I further believe that the Respondent offered the false testimony that it issued the memorandum on May 21 because it wished to delude the Board into finding that the Union's May 20 fax, which the Respondent did not receive until May 21, was its first knowledge of DeWeerd's prounion sympathies.

Gale and Flickema both testified that the May 20 memorandum was issued on May 21. Gale testified that he ordered the issuance of the memorandum solely because he had received, on the morning of May 21, the Union's May 20 fax naming 3 employee organizers in addition to Harkanson (who had been named in the Union's April 19 letter). Those 3 additionally named employee organizers were the 2 Montagues and DeWeerd. Flickema testified that he issued the memorandum on May 21 and that the "May 20" date on the memorandum was a "mistake," but he did not suggest how such a mistake could have been made. Moreover, on a keyboard the "1" (for May "21") and the "0" (for May "20") are a long way from each other; this was no typographical error. Additionally, without the slightest hesitation, Flickema first testified that he completed the May 20 memorandum in time for distribution "[o]n the Thursday before it went out in the paychecks." (Again, May 20 was a Thursday.) Only when counsel led Flickema by showing him a copy of the Union's May 20 fax which bore a late-afternoon date stamp did Flickema retreat from that assertion and state that, after all, it was on May 21 that he sent the Respondent's May 20 memorandum. Flickema was therefore not credible himself, and that Flickema's retrenchment was false testimony was clearly proven by the uncontested, and completely credible, testimony of Harkanson that he received the memorandum on the evening of May 20 along with his paycheck.

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[3] Because the Respondent did not call supervisor Deboer to testify, the General Counsel argues on brief that I should draw an adverse inference against the Respondent and find that Truskoski told Deboer late on May 19 that DeWeerd had spoken on that date in favor of the Union. If anything, an adverse inference properly lies against the General Counsel for not asking DeWeerd if he had, in fact, spoken in favor of the Union on May 19.

The reason for Flickema's false testimony, and Gale's false testimony to the same effect, is obvious.[4] The Respondent wanted the Board to believe that its May 21 receipt of the Union's May 20 fax was its first knowledge that employees other than Harkanson were in favor of the Union, which is the effect of Gale's testimony that that receipt was his first knowledge of DeWeerd's prounion sympathies. The Respondent would not have adduced this false testimony by Gale and Flickema unless there had been a critical reason for it. That reason, I find, was that the Respondent had knowledge of DeWeerd's prounion sympathy before it discharged him. There is no other possible reason for the Respondent's introduction of the false testimony about when the May 20 memorandum was issued. (Of course, the Respondent could have lawfully received knowledge of DeWeerd's prounion sympathies at some point after his 7:00 a.m. discharge on May 20, but in plenty of time to issue the May 20 memorandum on that date. If that had been the case, however, the Respondent would adduced adduced testimony to so reflect.)

I further find that the Respondent had animus, or unlawful motivation, which prompted the discharge of DeWeerd.

As stated by the Board in *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996):

> Finally, the Board has inferred knowledge where the reason given for the discipline is so baseless, unreasonable, or contrived as to itself raise a presumption of wrongful motive. *Whitesville Mill Service Co.*, supra [307 NLRB 937 (1992)]; *De Jana Industries*, 305 NLRB at 849; *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Even where the employer's rationale is not patently contrived, the Board has held that the "weakness of an employer's reasons for adverse personnel action can be a

[4] Further evidence of Gale's willingness to give false testimony lies in his testimony that no employee ever told him that he opposed the Union. That testimony was squarely impeached by Arnold who testified that he had told Gale exactly that. Arnold, being an antiunion employee, had no reason to lie on the point.

factor raising a suspicion of unlawful motivation." See generally *General Films*, 307 NLRB 465, 468 (1992).

First, Gale testified that DeWeerd had been chronically late in turning in his paperwork and that on at least one occasion DeWeerd wrote his time-and-materials information on a piece of Styrofoam. Gale testified that the harm in this practice was that it "creates another job for Dan [Flickema] to do, to transfer it on to one of these [billing] cards." Flickema, again the Respondent's bookkeeper and accountant, did not corroborate this testimony in any respect. Specifically, Flickema did not testify that DeWeerd's tardiness in paperwork, or his once using Styrofoam to report his time and materials, caused any bookkeeping or billing problems for the Respondent. If there had been any truth to Gale's testimony in this regard, the Respondent would assuredly have called Flickema, an admitted supervisor, to corroborate it. I draw an adverse inference against the Respondent for this failure to seek the support of supervisor Flickema for this contention by Gale.[5] Moreover, Gale testified that he tries to "give my employees the benefit of the doubt" when things are not "working right," but he did not warn, forthrightly or delicately, DeWeerd that his derelictions of paperwork somehow imperiled his employment. This failure to give any warning is a strong indicator that DeWeerd's prior work history was not the real reason for his discharge.

A second reason that Gale cited for DeWeerd's discharge that he "was rough with Company property and Company tools." The Respondent, however, allowed the antiunion Arnold to abuse Company property when it left him unpunished for running a stop sign and damaging a Company truck. And the Respondent did not even investigate when one of 2 employees damaged a Company grader. Moreover, after first attempting to evade answering, Gale finally admitted that DeWeerd had never damaged any Company property.[6]

Third, Gale testified that DeWeerd had, once, "responded with some profanity" when Gale had asked him how a project was going. On brief, the Respondent attempts to enlarge this testimony by claiming that DeWeerd "actually swore at the owner on several occasions." Gale did not testify that DeWeerd had sworn around him more than once; certainly Gale did not testify that DeWeerd had sworn at him "on several occasions." Moreover, Gale did not testify that DeWeerd cursed him, as opposed to generally cursing about a situation. At any rate, this one occasion was, again, not one over which Gale warned DeWeerd that he was engaging in unacceptable conduct.

Fourth, Gale testified that what "finally" made him decide to discharge DeWeerd was what he overheard Truskoski say to Deboer on the afternoon of May 19, immediately before he decided to discharge DeWeerd. Gale testified that he then overheard Truskoski complain to Deboer that DeWeerd had complained to him throughout the work day and that: "He [Truskoski] had said for the most part that didn't care who he worked with but he would rather that he didn't work with Steve anymore." On brief, the Respondent argues that: "Faced with the prospect of losing good employees, DeWeerd was discharged." The unfounded assumptions in this statement are manifold: Gale did not testify that Truskoski was a "good" employee[7]; Gale did not testify that "employees" (plural) were reacting to DeWeerd's complaining, only Truskoski; and Gale did not testify that Truskoski threatend to quit if he had to continue to work with DeWeerd again. Truskoski, according to Gale, had said only that he would "rather" not work again with DeWeerd. The Respondent's contention that even

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[5] See *Property Resources Corp.*, 285 NLRB 1105, 1105 fn. 2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988), where the Board explained that: "An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party."

[6] Gale's admission that DeWeerd had never damaged Company property is most probably the reason that on brief the Respondent does not even mention Gale's "rough treatment" reason for discharging DeWeerd.

[7] DeWeerd was a master plumber; if Truskoski was of equal accreditation, Gale did not so testify. Also, if Truskoski was ever used to "put out fires," as was DeWeerd, Gale did not so testify

one employee had threatened to quit over DeWeerd's conduct is clearly a rhetorical concoction that reveals the pretextual nature of the defense asserted. More importantly, Gale's testimony that he discharged DeWeerd because Truskoski had complained about DeWeerd is absolutely antithetical to Gale's professed policy that

> I try to give my employees the benefit of the doubt, if they are having bad days or, you know, things aren't, you know, working right -- working out right in one way or another, and I try to be as tolerant as I can with people or situations where it might be mistakes, whatever.

Gale did not testify that other employees (or Truskoski) had previously complained about DeWeerd's complaining. Assuming the truth of Truskoski's report to Deboer, it appears that DeWeerd was having no more than a "bad day[]," as Gale used the term at trial. That is, there is no way to reconcile the quoted lofty statement of Gale's personnel policy with the Respondent's abrupt treatment of DeWeerd, except to find that that policy was abandoned because Gale had somehow discovered, before the early-morning May 20 discharge of DeWeerd (as well as before the late-afternoon May 20 receipt of the Union's fax), that DeWeerd had joined the organizational attempt.[8]

The Respondent having advanced only sham reasons for the discharge of DeWeerd, it must be found that DeWeerd's known or suspected prounion sympathies or activities were the real reason for that discharge. The Respondent has therefore not met its *Wright Line* burden of demonstrating by a preponderance of the evidence that it would have discharged DeWeerd even absent those sympathies or activities. Accordingly, I find and conclude that the Respondent discharged DeWeerd in violation of Section 8(a)(3).

## The remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative actions that are designed to effectuate the policies of the Act. The Respondent must be required to post the appropriate notice to all employees. Because the Respondent unlawfully discharged employee Steve DeWeerd, it must offer DeWeerd reinstatement and make him whole for any loss of earnings or other benefits, computed on a quarterly basis from the date of his discharge to the date of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be ordered to expunge from its files all records of the violative discharge of DeWeerd and notify DeWeerd in writing that this has been done. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

## ORDER

The National Labor Relations Board orders that the Respondent, Gale Plumbing and Hydronics, Inc., of Wyoming, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees because of their protected activities on behalf of the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

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[8] Another unsupported claim in the Respondent's brief is that DeWeerd was discharged because he "blatantly refuse[d] tasks that were assigned to him." As noted, on cross-examination DeWeerd did admit refusal of one task (not "tasks"), but Gale did not testify that the refusal was part of the reason for the discharge.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative actions that are necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to Steve DeWeerd full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges that he previously enjoyed.

(b) Make DeWeerd whole for any loss of earnings or other employment benefits that he suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to DeWeerd's unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that evidence of the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Wyoming, Michigan, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 20, 2004, the date of the unfair labor practice found herein.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent had taken to comply.

Dated, Washington, D.C.

_____
David L. Evans
Administrative Law Judge

[10] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge you, or otherwise discriminate against you, because of your membership in, or activities on behalf of, or sympathies with West Michigan Plumbers, Fitters and Service Trades, Local Union 174, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Steve DeWeerd full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Steve DeWeerd whole for any loss of earnings or other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Steve DeWeerd ,and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that his discharge will not be used against him in any way.

GALE PLUMBING AND HYDRONICS, INC.

Date _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent of the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.